of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority or does not know or believe him to be a partner.

8. Partners bound by acts on behalf of firm.

An act or instrument relating to the business of the firm and done or executed in the firm-name, or in any other manner showing an intention to bind the firm, by any person thereto authorized, whether a partner or not, is binding on the firm and all the partners:

Provided that this section shall not affect any general rule relating to the execution of deeds or negotiable instruments.

Accordingly, I allowed the appeal by the plaintiff.

BANK KERJASAMA RAKYAT BERHAD

v.

ANTHONY GOMEZ S/O CLEMENT ANDREW GOMEZ & ANOR.

HIGH COURT, SHAH ALAM
TUAN MOHD HISHAMUDIN BIN MOHD YUNUS JC
[ORIGINATING MOTION NO. 25-9-93]
20 APRIL 1993

PRACTICE & PROCEDURE: Plaintiffs given judgment in an action for defamation - Magistrate fixing another date for hearing of the assessment of general damages - Defendant claiming that quantum of damages should be determined at the time of delivery of decision - Defendant filing appeal against Magistrate's decision - Defendant applying to stay the proceedings relating to assessment of general damages until the disposal of the appeal - Principles applicable in an application for stay of proceedings - Whether there were merits in the defendant's application.

The plaintiffs/respondents suceeded in their action for defamation against the defendant/applicant. The learned Magistrate fixed another date for the hearing of the assessment of general damages. The applicant appealed against the decision of the learned Magistrate and applied to the Magistrates Court for a stay of proceedings pending the disposal of the appeal which application was rejected.

The applicant then applied to the High Court to stop the learned Magistrate from proceeding to assess the general damages, on the date that had been fixed, until the disposal of the appeal. In support of the application, the applicant argued that the learned Magistrate should, as a matter of legal procedure, determine the quantum of general damages at the time of delivering her decision. The applicant further argued that the fixing of a date for the assessment of general damages tantamounts to an abuse of the process of the Court in that the learned Magistrate by doing so was giving the respondents an opportunity to reopen the case at the hearing of the assessment.

Held:

[1] A stay of proceedings is a matter of discretion and the Court must exercise its discretion as to what is the fairest mode, upon taking all matters into consideration, of trying the several disputes which exist between the parties. The Court must exercise its discretion whenever it is just and reasonable to do so.

[2] There was no merit at all in the present application. Even assuming that the the learned Magistrate was wrong in appointing a different date for the assessment of general damages, what she has done is nothing really extraordinary. The respondents, having succeeded in their action for defamation, are entitlted to know how much damages, be it nominal or otherwise, they are going to get and all that the learned Magistrate wants to do is determine the amount of damages and dispose of the case.

[3] It is speculative and farfetched for the applicant to argue that the hearing of the assessment of the damages may be used by the respondents to reopen the case. The hearing is only for the purpose of assessing general damages and therefore no party can make use of it for any other purpose. In any event the applicant is entitled to object to anything done either by the Magistrate or the respondents at the hearing, which in his opinion is an abuse of the procedure. The applicant is also entitled to appeal against any ruling which he feels is improper or wrong in law.

Obiter:

> Parties to a case are reminded that they should refrain from accusing any Judge or Magistrate of abusing the process of the Court, unless such accusation could be justified by strong and clear evidence. Otherwise the party or Counsel concerned may be cited for contempt of Court.

[Defendant's application dismissed with costs].

Case referred to:
Board of Governors of Sekolah Menengah St. Gabriel v. Ranjit Singh [1970] MLJ 38 ***(foll)***

For the applicant - Mohd Yacob bin Karim
For the respondents - K. Nadarajah

JUDGMENT

Mohd Hishamudin bin Mohd Yunus JC:
This is an application for a stay of further proceedings in respect of a particular in the Magistrate's Court, Klang. I shall first outline the background. The respondents/plaintiffs filed an action for defamation against the applicant in the Magistrate's Court, Klang. They claimed both special and general damages. At the conclusion of the case, the learned Magistrate gave judgment for the respondents/plaintiffs. In giving judgment, however, the learned Magistrate, although she dismissed the respondents'/plaintiffs' claim for special damages, did not state the quantum of general damages awarded. Instead, she fixed another date for the hearing of the assessment of general damages. The applicant/defendant appealed against the decision and one of the grounds of appeal is that the learned Magistrate erred in failing to determine straightaway the quantum of damages for general damages at the time of pronouncing judgment. Having filed the notice of appeal, the applicant/defendant then applied to the Magistrate's Court for a stay of proceeding pending the disposal of the appeal. The application was rejected by the learned Magistrate.

The applicant/defendant now applies to this Court to stop the learned Magistrate from proceeding to assess general damages on the date that has been fixed by her (24 April 1993) until the appeal is disposed off. The applicant argues that the learned Magistrate should, as a matter of legal procedure, determine the quantum of general damages at the time of delivering her decision (which was in favour of the respondents/plaintiffs), on 18 February 1993. The applicant further argues that the fixing of a date for the assessment of general damages by the learned Magistrate tantamounts to an abuse of the process of Court in that the learned Magistrate by so doing is giving the respondents/plaintiffs an opportunity to reopen the case at the hearing of the assessment.

As to the approach that I wish to adopt in deciding this application, I wish to refer to what Raja Azlan Shah J. (as he then was) had to say on stay of proceedings in *Board of Governors of Sekolah Menengah St. Gabriel v. Ranjit Singh* [1970] MLJ 38, at p. 39:

> I hold the view that a stay of proceedings is a matter of discretion and that the Court must exercise its discretion as to what is the fairest mode, upon taking all matters into consideration, of trying the several disputes which exist between the parties. In one case one consideration may have more sway, more cogency, and more effect than that same consideration, perhaps, have in another. Putting it in another way, the Court must exercise its discretion whenever it is just and reasonable to do so.

I do not propose at this stage to express any view on the issue whether the learned Magistrate was right or wrong in fixing another date solely for the purpose of assessing general damages. Since the applicant has filed a notice of appeal and this particular issue will be one of the issues

to be decided in the appeal, therefore, I think I ought to refrain myself at this stage from making any ruling which is bound to prejudice one of the parties to the appeal.

Now, on the merits, with respect, it is my view that I fail to see any merit at all in this application. The learned Magistrate might be wrong, or she might be right, in appointing a different date for the assessment of general damages. But even assuming for the moment that she was wrong in terms of procedure, nonetheless I do not think that she has done anything that was really extraordinary. The respondents/plaintiffs in this case, having succeeded in their action for defamation, like any other plaintiff in a similar action, are entitled to know how much damages, be it nominal or otherwise, they are going to get. All that the learned Magistrate wants to do is just to determine the general damages. And I am of the opinion that the fairest thing to do under the circumstances is not to interfere but to let the learned Magistrate finish her job (to dispose of this case).

I consider it speculative and farfetched for the applicant to argue that the hearing of the assessment of the damages may be used by the respondent to reopen the case. The hearing is only for the purpose of assessing general damages in terms of prayer 15(a) of the respondents'/plaintiffs' statement of claim. Therefore, needless to say, no party can make use of the hearing for any other purpose. Moreover, the applicant is given an opportunity to be present and to be heard at the hearing. He is entitled to object to anything done either by the Magistrate or the respondents/plaintiffs at the hearing which in his opinion is an abuse of the procedure. He is also entitled to appeal to this Court against any ruling which he feels is improper or wrong in law.

Finally, I must stress here that I fail to see any abuse of the process of Court by the learned Magistrate. I wish to remind that parties to a case should refrain from accusing any Judge or Magistrate of abusing the process of Court, unless such accusation could be justified by strong and clear evidence. Otherwise the party or Counsel concerned may be cited for contempt of Court.

Accordingly, this application is dismissed with costs.

Application dismissed.

CHERYL WENDY OMAR

v.

PUBLIC PROSECUTOR

HIGH COURT SABAH & SARAWAK, TAWAU
TUAN IAN H.C. CHIN J.
[CRIMINAL APPEAL NO. T(42)-13 OF 1993]
15 JULY 1994

CRIMINAL LAW: Charge of criminal breach of trust - Penal Code s. 409 - Ingredients - Entrustment - No evidence that cash money stated in the charge paid or entrusted to accused - Accused proved to have issued payment receipts - Prima facie case - Whether established.

CRIMINAL PROCEDURE: End of prosecution case - Accused called upon to rebut prosecution's case on the balance of probabilities - Whether a misdirection in law.

EVIDENCE: Burden of proof - Proof of guilt - Whether onus thereof could shift to the accused - Evidence Act s. 104 - Issuance of payment receipts per se - Whether sufficient proof that money was paid - Whether correctness of facts stated therein to be proved independently.

This was an appeal by the accused against the conviction and sentence passed against her by the Sessions Judge, Tawau, in respect of an offence of criminal breach of trust under s. 409 Penal Code. In essence the charge against the accused was that between the months of January to November 1990, at the Water Bill Collection Counter, Majlis Perbandaran Tawau, the accused, as a public servant and entrusted with cash of RM156,663.90, committed criminal breach of trust in respect of that property.

The facts showed that the accused, who was employed by the Water Department, was assigned the duty of collecting money due on bills at the said office from consumers of water. For that purpose she was given some books of receipts to be issued to the payers and also cash books in which to record the necessary entries respecting the money she received from those payers. It was also her duty to cause the money thus received to be credited to the bank for the credit of the Government.

Through an audit report of one Mr. Chong, evidence was adduced which showed that during the material period the accused had issued 1749 receipts in respect of payments by consumers amounting to RM156,663.90, which money,